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Nos. 07-984 and 07-990

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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR RESPONDENT GOLDBELT, INC. IN SUPPORT OF PETITIONERS

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in Goldbelt's brief in support of petitioners remains accurate.

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I. REPLY

Respondents Southeast Conservation Counsel, Sierra Club and Lynn Canal Conservation ("SEACC") have not opposed Goldbelt's request for affirmative relief. Accordingly, if the Court grants the relief requested by either Coeur Alaska, Inc. ("Coeur"), or the State of Alaska ("State"), it should also reverse the Ninth Circuit's decision vacating Goldbelt's Section 404 permit for the Cascade Point Marine Terminal, as described in Goldbelt's opening brief.

The Court should not be distracted by the hypothetical concerns of the Nondalton Tribal Council, et al., amici Native organizations opposed to the proposed Pebble Mine project in the Bristol Bay region of Alaska, more than 1000 miles north and west of the Kensington Mine.[1] The Tlingit Indian shareholders of Goldbelt do not take lightly the fears of Bristol Bay Natives that a large scale mining project could adversely impact their subsistence hunting and fishing activities. Similar concerns had to be addressed in planning for the Kensington Mine, which is located in the heart of Tlingit aboriginal territory. Like their Bristol Bay brethren, the Tlingit could not have supported any development that threatened use of their traditional areas for subsistence activities. J.A. 332a.

The Nondalton brief, as well as some other amici briefs filed in support of SEACC, misleadingly suggests that regulation of tailings disposal through the Corps of Engineers' ("Corps'") 404 permitting

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[1] Brief for the Nondalton Tribal Council, et al., as Amici Curiae Supporting Respondents (hereinafter referred to as the "Nondalton" brief).

program is tantamount to no regulation at all. Nothing could be further from the truth. As pointed out in the briefs of the federal agencies, Coeur and the State, the Environmental Protection Agency's ("EPA's") National Pollution Discharge Elimination System ("NPDES") permit program under Section 402 of the Clean Water Act ("CWA")[2] and the Corps' dredge and fill permit program under Section 404 of that Act,[3] while mutually exclusive, are complementary. Both are intended to implement the CWA's statutory objective to "restore and maintain the . . . integrity of waters of the United States. 33 U.S.C. § 1251. Compare 40 C.F.R. § 230.1 (purpose of 404(b)(1) Guidelines).

The 404(b)(1) Guidelines,[4] crafted by the EPA to control issuance of dredge and fill permits, are particularly well suited to address the broad range of concerns raised in the Nondalton brief. No 404 permit will be issued if the Corps finds, based on thorough testing prescribed in the Guidelines, that permitting the proposed project would cause or contribute to significant degradation of waters of the United States by, inter alia, significantly adversely affecting fish and wildlife, aquatic ecosystems, or recreational and aesthetic values. 40 C.F.R. 230.10(c). Likewise, no permit will be issued if the Corps determines that a practicable, environmentally superior alternative is available that does not require a discharge into waters of the United States. 40 C.F.R. 230.10(a).

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[2] 33 U.S.C. § 1342.

[3] 33 U.S.C. § 1344.

[4] 40 C.F.R. §§ 230.1, *et seq.*

The Corps' 404 permitting process is further constrained by a variety of interlocking environmental laws designed to insure that the concerns raised in the Nondalton brief will be considered and addressed. These requirements include, without limitation, the National Environmental Policy Act's[5] requirement for preparation of a comprehensive Environmental Impact Statement, Essential Fish Habitat review pursuant to the Magnuson-Stevens Act[6] with special emphasis on protection of anadromous fish habitat, and consultations designed to identify and protect any resident species listed under the Endangered Species Act.[7] Prior to granting any 404 permit for mining activities on federal lands, the Corps must carefully review the effect that the proposed activity may have on subsistence uses and resources pursuant to Section 810 of the Alaska National Interest Lands Conservation Act[8] and take appropriate steps to minimize adverse impacts. All of these, and more reviews – over 900 studies in total – were thoroughly documented and found acceptable by the State and federal agencies for the Kensington project.

The tribal entities joining in the Nondalton brief enjoy a government-to-government relationship with federal agencies. Their views will be entitled to special consideration in any permitting process for

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5 42 U.S.C. § § 4321, *et seq.*

6 16 U.S.C. § § 1801, *et seq.*

7 16 U.S.C. § § 1531, *et seq.*

8 16 U.S.C. § 3120, *et seq.*

the proposed Pebble Mine.[9] Indeed, the Tlingit Indians' experience throughout the permitting process demonstrates that, far from neglecting concerns such as those raised in the Nondalton brief, the federal agencies work closely and cooperatively with Native groups to address their concerns and accommodate their needs.

Throughout the Kensington permitting process the views of area Tlingit Indians were heard and respected by the federal agencies and by the permittee, Coeur, in particular. J.A. 505a ("No other company . . . has ever worked so conscientiously as Coeur to involve the Natives of northern Southeast Alaska in the planning of its activities . . . ."). The end result of the Kensington permitting process is a project that fully protects the subsistence uses and resources of Berners Bay. J.A. 332a-333a.

The federal agencies and Coeur also worked diligently to ensure that the environmentally sound Kensington Mine project provided much needed jobs to economically troubled Natives of Southeast Alaska. About 25 percent of the construction force at the Kensington Mine was Alaska Native, and Coeur has promised to continue to work with Native

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[9] Federal agencies are required to consult with their tribal counterparts prior to taking actions that may have an adverse impact on tribal interests. *See* Presidential Executive Memorandum dated April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments (http://www.hhs.gov/intergovernmental/tribal/presmemo.html); Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=16571); U.S. Army Corps of Engineers, Tribal Policy Principles (www.nwk.usace.army.mil/offices/TribalDocs/USACETribalPolicyPrinciples.pdf).

Corporations, including Goldbelt, to have them provide goods and services for Coeur's ongoing work at the Kensington Mine. As Goldbelt has explained, "[i]t would be difficult to overstate the importance of the Kensington Gold Project to the Tlingit Indians of the Juneau area." Br. in Supp. of Pet. for Writ of Cert. at 4.

The Kensington example demonstrates the ability of the Corps' 404 permitting process to take into account and protect the types of concerns raised in the Nondalton brief. Indeed, while SEACC and the other respondents question the decision to permit the Kensington Mine under Section 404 as a matter of law, they have not challenged the adequacy of any of the countless environmental reviews, or any of the specific findings made by the Corps, the Forest Service, the EPA, or the myriad other federal, state and local agencies that exhaustively evaluated the Kensington project and concluded that it would not result in substantial harm to the environment, including waters of the United States.

The Pebble project is only now in its conceptual/design stages. The necessary permits applications have yet to be filed. Assuming that the speculative description of the project in the Nondalton brief is correct, however, it is clear that there is absolutely no comparison between Pebble and the Kensington:

- If permitted, Pebble will mine a different body of ore with its own unique characteristics, employing a different mining method (open pit, as opposed to underground), in a significantly different climate and ecosystem.

- The projected volume of tailings to be disposed of at Pebble is more than 500 times larger than the estimated Kensington volume.
- The chemical composition of any process water associated with the Pebble tailings and its potential impact on fish, wildlife and aquatic ecosystems have yet to undergo exhaustive testing comparable to what was done at Kensington.
- Whereas the Kensington enjoys widespread local support among Southeast Alaska governments, businesses and Natives organizations, the Pebble project has raised statewide concerns and apparently is opposed by a broad coalition of Native governments and organizations.

Each of these factors will weigh heavily in the scales of the Corps' 404(b)(1) process and public interest review, and the many other environmental reviews by federal, state and local agencies that have yet to be conducted at Pebble. The Nondalton brief provides no reason to fear that the federal agencies will not exercise the same care they demonstrated during the Kensington permitting process in evaluating any future permitting requests for Pebble.

The assumption that a decision in favor of Coeur Alaska, Inc., in this case will result in all the speculative harm hypothesized in the Nondalton brief is belied by the experience of Southeast Alaska Natives in the Kensington process and is unwarranted. Pebble, like Kensington, will be judged on its own merits and a record that has yet to be made (and in the case of Pebble may never be

made). The facile and flawed analogy of the Pebble project to the Kensington Mine should not distract the Court from deciding the important issue on the record before it.

That record fully supports affirmation of the Section 404 permit for the Coeur Alaska Kensington tailings facility as well as the Section 404 permit for the Goldbelt Marine Terminal as environmentally sound, preferable alternatives that will finally allow the Kensington Mine to provide much needed jobs and other benefits for Alaska Natives and Southeast Alaska communities.

II. CONCLUSION

For these reason, and for the reasons set out in the briefs on the merits of Coeur, the State, and the federal respondents, the decision of the Ninth Circuit Court of Appeals should be reversed as to the federal respondents, Coeur, the State and also Goldbelt.

Respectfully submitted.

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December 1, 2008